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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIE ALEX MENDOZA et al.,

Defendants and Appellants.

B256644, B260903

(Los Angeles County
Super. Ct. No. PA066593)

APPEAL from a judgment of the Superior Court of Los Angeles County, David B. Gelfound, Judge. Affirmed.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Louie Alex Mendoza.

Law Offices of E. Thomas Dunn, Jr., and E. Thomas Dunn, Jr., for Defendant and Appellant Nerio Celaya.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Rene Judkiewicz, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Louie Alex Mendoza (Mendoza) and Nerio Celaya (Celaya) of the first degree murder and torture of Lupe F., and the court sentenced both men to life imprisonment without the possibility of parole. Mendoza and Celaya appeal, and we affirm.

BACKGROUND

An information filed October 9, 2012 charged that on or between January 12 and 13, 2010 Mendoza and Celaya murdered and tortured Lupe F. in violation of Penal Code sections 187, subdivision (a) and 206, and alleged that Mendoza and Celaya intentionally murdered Lupe F. and the murder involved the infliction of torture, in violation of Penal Code section 190.2, subdivision (a)(18). The information also alleged that Mendoza had a prior strike (Pen. Code, §§ 667, 1170.12) and three prior prison terms (Pen. Code, § 667.5, subd. (b)).

Mendoza and Celaya pleaded not guilty and after a joint trial, the jury found both men guilty on all counts and found the torture enhancement true. Mendoza admitted the prior prison term allegations, and the trial court found his prior strike not true. The trial court sentenced Mendoza and Celaya each to life without the possibility of parole on the murder count, and to life imprisonment on the torture count, with the torture sentence stayed pursuant to section 654. The court imposed three one-year prior prison term enhancements as to Mendoza, to run consecutively with his murder sentence. The court awarded both defendants presentence custody credit for actual time in custody and assessed fines and fees.

Mendoza and Celaya filed timely appeals, and we consolidated the appeals for briefing, oral argument, and decision.

Evidence at trial

The prosecution's case

Mendoza and Celaya are cousins. In January 2010, Celaya owned a tattoo shop in Arleta called Painful Pleasures, where Mendoza worked as a tattoo artist. Cynthia

Chacon, also a cousin of Mendoza and Celaya, often spent time at the shop. Cynthia¹ testified that at around 10:00 a.m. on January 12, 2010, she drove with her roommate Carmen Gomez to the tattoo shop. The blinds were down, and Mendoza and Lupe F. were asleep on the floor. Mendoza had been staying at the shop after a falling out with his mother, Elsa Chacon. Lupe F. had been Mendoza's girlfriend since November; she and Mendoza called each other "Lovely." Celaya and Mendoza's brother Henry Morquecho were also inside the shop. Mendoza, Celaya, Cynthia, and Henry were very close.

Cynthia left to buy a cell phone for Mendoza, returning to the tattoo shop with the phone at around 11:00 a.m. She left the shop again around 1:00 p.m. to get her hair cut, taking Carmen with her. After her haircut, she called Mendoza, and picked up lunch for herself, Carmen, Mendoza, and Lupe F. before returning to the shop. Cynthia and Carmen left the shop again around 7:30 p.m. to get Mendoza some medicine and a warm drink, because he was sick. At some point, Cynthia saw Mendoza, Celaya, Henry, and Lupe F. pull out a methamphetamine pipe, and she went outside to smoke a cigarette. At around 8:30 p.m., Cynthia drove Lupe F. to Lupe F.'s mother's house to pick up some blankets, as Mendoza and Lupe F. planned to spend the night in the tattoo shop. Cynthia and Lupe F. returned with the blankets around 9:00 p.m., and she and Carmen soon went home for the night, leaving Mendoza, Lupe F., Celaya, and Henry at the shop.

At 7:30 a.m. the next day, January 13, Cynthia, at work in Orange County, received a call from Mendoza on Henry's phone. He asked Cynthia to drive back to the valley to a house on Cobalt Street. Mendoza said it was an emergency and he had good news, and asked her to call Celaya, wake him up, and tell him to bring two shovels. Cynthia told Mendoza she couldn't leave work. When she got off work at 4:15 p.m., she picked up Carmen and they drove to the valley. Cynthia called Celaya, who said he would bring shovels and "he knew what [Mendoza] was talking about." Cynthia and

¹ For clarity, we will use first names in subsequent references to some of the witnesses, intending no disrespect.

Carmen arrived at the house on Cobalt around 7:00 p.m. Mendoza told them to back the car into the driveway.

Cynthia and Carmen went into the house, and followed Mendoza to the garage door, staying in the doorway while he went into the garage. The garage light was dim. Mendoza lit a cigarette lighter and waved it over a blue trash barrel with a black trash bag on top, saying, “This is [Lupe F].” He was talking rapidly and was not acting like himself; Cynthia thought he was under the influence of methamphetamine. Mendoza said that Lupe F. was going to kill him, so he killed her first. Lupe F. had stolen baseball cards that he, Celaya, and Henry had planned to sell. Mendoza said he asked Lupe F. about the baseball cards and then he described beating her, standing over her and punching her while she fought back, breaking every bone in her face, and knocking out her teeth “so they wouldn’t be able to identify her.” Lupe F. kicked, screamed, and begged him to stop, crying and calling him “Lovely,” and saying she loved him. Mendoza said blood was flying everywhere, making a mess in the shop. “[H]e seemed proud of what he did,” and he said he was going to dig a hole under a bridge, put Lupe F.’s body into it, and light the body on fire. When Cynthia and Carmen met outside the bathroom, Carmen told Cynthia that Mendoza had “threatened to kill her next.”

Mendoza said he wanted Cynthia and Carmen to get someone to clean the tattoo shop and started to write down a phone number. He asked how to get license plates off “the truck” (Celaya drove a blue truck), and Carmen told him he needed a screwdriver. Cynthia locked arms with Mendoza and walked out the front door with him to protect Carmen, who followed them. Carrying a screwdriver, Mendoza crossed the street toward a vehicle parked on a cul-de-sac. The women jumped into Cynthia’s car and drove away.

Cynthia was frightened. She called her father and drove to Porter Ranch to meet her parents. Her mother took them to the police station, where Cynthia and Carmen gave statements to the police.

Mendoza had hit Lupe F. before. After Lupe F. punched Mendoza in the ear, he kicked her in the face and broke her nose. Cynthia had seen Lupe F.’s two black eyes.

Carmen Gomez's testimony was consistent with Cynthia's account of the events at the tattoo shop and at the house on Cobalt. Carmen added that at the tattoo shop, when Celaya and Henry were looking through the baseball cards and realized some were missing, Celaya, who was wearing a black shirt, said "[we] need to find out what is going on." The next day, when Carmen was briefly alone with Mendoza at the Cobalt house while Cynthia went to the bathroom, Mendoza asked, "You want me to kill you next?" Mendoza said he had killed Lupe F. by punching and choking her and knocking all her teeth out, while she screamed and kicked and told him she loved him; blood was everywhere. At one point he said he went to get an extension cord to choke Lupe F., but he didn't need to use it because she was already dead. Mendoza acted like he did when he was high. He asked Carmen to go see if there were police at the tattoo shop, and to report back to him.

A detective with the Los Angeles Police Department (LAPD) testified he was called out to the Cobalt house on January 13, where a SWAT team was attempting to arrest a barricaded suspect. After the arrest, the detective approached the house. A black Nissan Pathfinder backed into the driveway partially blocked the front entrance. A couple of shovels and a large roll-away suitcase were in the back seat. Inside the garage, the detective noticed a trash can with a black garbage bag over it and a yellow rope; he could see there was a body in the trash can, with the feet sticking out. The coroner's investigator removed the trash bag and the detective observed a deceased female, tied up with the yellow rope. The coroner's investigator cut the rope and pulled the body out. The body was hogtied and very bloody, with duct tape around the ankles and around the head covering the mouth, bits of gravel in the hair, and glass fragments on the clothing.

The detective also visited the tattoo shop, where he found signs of a struggle, including broken glass, overturned furniture, blood on the floor, and blood spatters on a mirror. The window blinds were down and a comforter was draped over a fish tank so no one could see inside. There was blood on the bathroom wall, a bucket containing brownish water, and a damp, pinkish-colored mop. A trashcan held broken glass covered with blood. The detective saw yellow rope like the rope around the body, and clothing in

plastic bags, similar to bags he had seen in the garage at the Cobalt address. A trashcan in the bathroom held a spool of gray duct tape and other bloody material.

The coroner's investigator testified that Lupe F.'s body was cold to the touch when removed from the trash can, and estimated that she had been dead for some time, but under 24 hours. There were lacerations and contusions on her swollen face, and ligature marks on her neck from the rope.

A LAPD police sergeant testified that on January 13 no one answered a knock at the Cobalt address, so the police kicked the door open. They searched the house and found no one. They entered the dim garage, and saw the barrel with the black trash bag over it and the yellow rope. An officer peeled away some of the trash bag, revealing a hogtied body. Two officers eventually found Mendoza hiding in a crawl space in one of the bedrooms, but he refused their commands to come down, threw shards of glass, and yelled unintelligible things and "I didn't do it, leave me alone." The sergeant opined he was under the influence of narcotics. A SWAT team eventually took Mendoza into custody.

The detective who interviewed Mendoza after his arrest on January 14, 2010 testified that Mendoza was five feet six inches tall and weighed 150 pounds. On the day of the arrest and five days later, the detective observed no injuries on Mendoza's hands and arms. The detective traced Celaya's cell phone to Calexico, where Celaya was arrested on February 6. At the time of the arrest, Celaya was five feet 11 inches tall and weighed 320 pounds. Officers discovered a blue Toyota Tundra with its license plates removed parked on a cul-de-sac near the Cobalt house. The license plates lay on the floorboard of the front passenger side, and a wad of grey duct tape was in the truck bed. The truck was registered to Gina Madrid in Calexico. Celaya had been arrested on suspicion of burglary near the Cobalt house on January 14, 2010 but was released the next day.

The criminalist who collected evidence at the tattoo shop on January 14 testified that there were bloodstains and bloody footprints on the shop floor. More blood was in a blue bin, in the bathroom and the bathroom trash can (in which there was a roll of grey

duct tape), on the mop and in the bucket, and on bloody clothing in other trash containers. A cell phone and some baseball cards were in the sink area, and a bullet was on the middle of the floor. The criminalist also searched a blue Toyota Tundra, recovering three bullets with the same head stamps as on the one in the tattoo parlor, a piece of paper with writing on it, a piece of glass, and a piece of duct tape. A glass fragment in a bag in the bed of the Tundra tested positive for blood with Lupe F.'s DNA profile, and possibly Mendoza's profile as well. The criminalist found two shovels in the back seat of a black Nissan Pathfinder. Another criminalist testified that DNA matching Mendoza's and Lupe F.'s profiles had been detected on the shorts Mendoza was wearing at the time of his arrest. A triple-extra-large black T-shirt recovered from the tattoo shop had a mixture of two individuals' DNA; the major profile was Celaya's, and Lupe F.'s DNA profile was on the outside of the T-shirt.

The detective who searched the tattoo shop on January 14 testified that the shop smelled like Pine-Sol cleaner, a bottle of which was on the sink counter. Blood spatters and smears covered the mirror and back wall, the bathroom wall, and the fish tank and the blanket covering it. A letter written on yellow paper was crumpled up in a pile of clean clothing. The letter read: "Lovely, I know it is stressful and demotivating, but we can't just give up. I want to try this again because the last place didn't work out. It's been drama and bull, but let's not give up. I want to ask you if you are willing to go tonight to Chamberlain to sit and talk with Eileen and Jorge. They will give us a room and not charge rent. Only bills for the time we're there. I told her it's only temporary, or temp, a month or so. I really think we should go so you can see for yourself and speak yourself so you can decide if it's cool for us." The writer promised to "get myself together, get a job," and "I love you so much. I'm not gonna lose you or let you lose yourself. . . . We can't stay on the street not together. It will ruin us." The signature was a squiggle. Jorge A. testified that he had spoken to Lupe F. on January 12, 2010 about renting a room beginning that night to Lupe F. and Mendoza, in a home near Chamberlain Street that he shared with his girlfriend Ilene.

After the parties stipulated that Mendoza's mother (and Celaya's aunt) Elsa Chacon had died of natural causes on November 26, 2013, the jury heard a reading of her preliminary hearing testimony. Chacon had testified that in January 2010, she and her son Mendoza were not speaking, and she had turned off his cell phone. Her nephew Celaya had been staying at her house, and she had asked him to leave because he was smoking methamphetamine in front of her every day. He had put 200 marijuana plants in her garage. Celaya came to the house at 8:00 p.m. on January 13, 2010. He told Chacon that Mendoza had killed his girlfriend Lupe F. at the tattoo shop, because she had taken Mendoza's money, other belongings, and thousands of dollars in drugs. After the murder, they put Lupe F. in a bag and then a trash barrel, and drove the body in the Toyota Tundra to a house in Sylmar, intending to bury her somewhere. Celaya said that he was planning to have someone take his truck into the mountains and have it burned to destroy any DNA. Celaya told Chacon that he had gone to a house Chacon was moving into and jumped into the pool, because his shoes were full of blood, and he thought the chlorine would "kill any DNA that was on his shoes and on his clothing." Celaya was looking for a crew to clean up the blood that was all over the floor and the walls of the tattoo shop, but Chacon told him she would not involve anyone she knew in something like that. He asked to borrow her black Nissan Pathfinder overnight, and she agreed. Later, when Chacon spoke to Mendoza after his arrest, he told her that Celaya backed the Pathfinder into the driveway, went into the house, dropped the keys, and left by the back door. Celaya also told Chacon that he was at the tattoo shop when Mendoza killed Lupe F.

Mendoza's brother (and Celaya's cousin) Henry testified that he had been granted immunity from prosecution as an accessory after the fact in exchange for his testimony. In January 2010, he lived with his mother (Chacon). Mendoza had fallen out with Chacon and sometimes stayed in the tattoo shop with his girlfriend Lupe F., and Celaya lived in Calexico where he had a girlfriend named Gina. Mendoza looked up to Celaya, who was older. Celaya owned the shop, and he also grew marijuana and sold it out of the shop.

On the evening of January 12, Henry spent time at the tattoo shop with Cynthia, Carmen, Celaya, Mendoza, and Lupe F. During that time frame, Henry, Mendoza, Celaya and Lupe F. all spent nights at the tattoo shop, and all four smoked methamphetamine daily, including more than once on January 12. Henry had an organized collection of baseball cards, and that night he noticed that a few valuable cards and others were missing. When Carmen and Cynthia left the shop, only Henry and Lupe F. were there. Mendoza and Celaya came back to the shop, and Celaya told Henry to go and get him some duct tape, rope, and a two-liter bottle of soda. Henry walked to a 7-Eleven and bought the items, brought them back to the shop, and gave them to Celaya, who was waiting outside. Celaya then gave Henry \$40 and told him to go fill up the truck and “post up” to keep a lookout for police in front of the shop. Henry thought something bad was going to happen; he thought they might slap Lupe F. around a little, but not kill her. Celaya later called him to ask him “[h]ow’s it looking,” and Henry told him things were okay.

Henry drove around in the truck until 4:00 a.m. on July 13, when Celaya called and told him to pick them up. Henry waited outside the shop. When Celaya and Mendoza got into the truck, Celaya said to Mendoza: “[A]re you with me?” “Are you going to leave me?” Henry asked whether Lupe F. was coming, and Mendoza answered: “Not unless she has nine lives.” Henry assumed Lupe F. might be dead. Celaya then asked Henry to go get some bleach and clothing for Celaya and Mendoza, and Mendoza said, “Don’t get him involved in this shit.” Celaya said he needed to chop up Lupe F.’s body and put it in a trash can to get rid of it. Celaya said “we” had hit Lupe F. wrong, and also said he hit and choked her. Mendoza said she had been kicking a little and she broke the glass. Celaya rubbed his hand, which was swollen and had reddened knuckles. Mendoza had some scratches on his face and neck.

Henry, Celaya, and Mendoza drove to Chacon’s house, arriving around 7:00 a.m., and had a few beers in the garage. That evening, Celaya asked Henry for two shovels, which Henry gave him. Celaya left in Chacon’s black Nissan Pathfinder; that was the last time Henry talked to him.

The coroner testified that Lupe F.'s body was likely tied up after death to make it fit into the trash can. Lupe F. had multiple lacerations, bruises and abrasions on her face and mouth, multiple broken teeth, and five teeth knocked out. Lupe F. also had small wounds on her shins, a ligature mark on her neck, and bruises on her shoulders, her stomach, her knees, and her thighs. Bruising on her hands was typical of defensive wounds. Her head showed a tremendous amount of hemorrhage, and she had fractures on her nose and on both sides of her jaw and skull. Some of the head injuries were consistent with being hit with the butt end of a knife. A toxicology report showed methamphetamine in Lupe F.'s system. She died from multiple blunt force injuries and perhaps asphyxia from the rope around her neck.

The prosecutor played a recording of a telephone call Mendoza made from jail on May 16, 2013 to Anna M. Mendoza repeatedly insulted and cursed Anna M., threatening over and over to kill her or to have someone kill her if she did not give him back some money he believed she had taken. Mendoza had married Anna M. three weeks before trial.

The defense case: Mendoza

Mendoza called a toxicologist who testified that methamphetamine is a powerful stimulant with a high potential for addiction and dependency. The drug could cause irritation, agitation, confusion, paranoia, aggression, hallucinations, and irrational and violent behaviors. The level of methamphetamine in Lupe F.'s blood was "toxic," and someone who smoked the drug multiple times daily over a period of time would be addicted.

Nasir Shamsi (Shamsi) testified that at the time of Lupe F.'s murder, he maintained his medical marijuana pharmacy in the same complex as the Painful Pleasures tattoo shop. In December 2009 and January 2010, he was setting up a grow operation at Celaya's house in Calexico. One night between January 12 and 15, 2010, Shamsi went to the tattoo shop at around 11:30 p.m. or 12:30 a.m. to talk to Celaya about problems in setting up the grow operation. He saw Celaya's truck parked nearby. As he walked toward the shop, he heard muffled female screams, cussing, and a male voice. Shamsi

looked through the blinds and saw Celaya, wearing a black shirt, beating a crawling Lupe F. with the blunt end of a big knife. Celaya was beating Lupe F.'s head, neck and shoulders, and blood was everywhere; it looked like he was trying to saw her head off. Mendoza was lying inert on the floor. Shamsi ran away. Because he was out on bail, Shamsi did not immediately call the police. When he went back the next day, he saw Mendoza and Celaya taking a trash can out of the tattoo shop and loading the can into Celaya's truck. Later, when Shamsi spoke to Celaya on the phone, Celaya gloated that he had beaten and murdered Lupe F. Celaya claimed that what he did was justified, mentioning a scam and baseball cards.

On cross-examination, Shamsi testified that the first person he told about what he had seen was his roommate Danny, who had been Mendoza's cellmate in prison. When Shamsi contacted police about Lupe F.'s murder he was facing prosecution for kidnapping and commercial burglary and was hoping to reach some kind of deal with authorities, telling the detectives: "Work something out and I'll testify."

A LAPD police officer testified that late on January 12, 2010 or early in the morning of January 13, he and his partner observed Mendoza standing on a corner near the tattoo shop. Mendoza walked into an alley, and the officers stopped him because it was unusual for someone to be there at nighttime. The officers handcuffed Mendoza and had a long conversation with him. Mendoza was calm, worried, cordial, and respectful. He looked clean, his shirt was pressed, and he smelled as if he had just taken a shower. The officer saw no injuries. They released Mendoza. Subsequently, when the officer returned to work he learned that Mendoza was a murder suspect, and on January 14 he learned that Mendoza had been arrested for the murder of his girlfriend.

A LAPD detective who interviewed Shamsi testified that Shamsi began to shake visibly when he saw a photograph of Celaya.

The defense case: Celaya

The owner of the 7-Eleven store near the tattoo shop testified that in January 2010, the convenience store did not sell rope, and she had never seen duct tape at the store.

Closing argument

The prosecutor argued that Lupe F. was a domestic violence victim in love with Mendoza, her abuser, who planned to kill her because he believed that she was stealing from him and wanted him killed. Mendoza killed Lupe F. in revenge, inflicting as much pain as he could. Celaya aided and abetted the killing, helping and encouraging Mendoza before and after the murder. Mendoza's 2013 phone call with Anna Martinez showed he was an abuser who threatened to kill women who took something from him.

Mendoza's counsel argued that Shamsi's testimony that Mendoza was lying on the floor unconscious while Celaya beat Lupe F. to death was corroborated and credible. If Mendoza was guilty of anything, it was as an accessory after the fact.

Celaya's counsel argued that Mendoza's call to Anna Martinez and his threat to Carmen Gomez that she was next, showed that he was capable of murdering Lupe F. Celaya never should have gotten involved afterwards, but he was not guilty of murder. Cynthia and Carmen were telling the truth about Mendoza's description of the murder, in which he did not mention Celaya. Shamsi was not to be believed, and Henry's testimony, including that Celaya told him to buy rope and duct tape, was not true.

The jury deliberated for less than two hours before convicting Mendoza and Celaya on all counts.

DISCUSSION

Mendoza's appeal

The admission of Chacon's preliminary hearing testimony

Mendoza argues that the trial court violated his rights to confrontation and cross-examination by admitting Elsa Chacon's preliminary hearing testimony containing Celaya's incriminating hearsay statements, in particular Chacon's testimony that Celaya told her Mendoza murdered Lupe F. The prosecution's motion in limine sought the admission of the evidence as admissions and declarations against penal interest. The trial court stated that it understood the parties would stipulate to Chacon's unavailability, and that rather than ruling on the admissibility of Chacon's testimony before trial, "I think we should just take up all those when we take up the preliminary hearing transcript."

Mendoza's counsel agreed. During trial, without having explicitly ruled on the admissibility of Chacon's statements, and with no objection from Mendoza's trial counsel, the trial court allowed the reading of Chacon's preliminary hearing testimony.

Mendoza claims the admission at the joint trial of his codefendant Celaya's statements to Chacon implicating Mendoza in Lupe F.'s murder violated the *Aranda/Bruton* rule, which holds that admission into evidence at a joint trial of a nontestifying codefendant's confession implicating the defendant violates the right to cross-examination under the confrontation clause. (*People v. Aranda* (1965) 63 Cal.2d 518, 530; *Bruton v. United States* (1968) 391 U.S. 123, 126, 135, 137.) Mendoza did not object on this basis at trial, and his "failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable." (*People v. Valdez* (2012) 55 Cal.4th 82, 130.) With the consent of Mendoza's counsel, the trial court deferred ruling on the statements Celaya made to Chacon. Mendoza's counsel did not object to the reading of the preliminary hearing transcript, and the trial court did not make an explicit ruling regarding Chacon's testimony. "[F]ailure to press for a ruling on a motion to exclude evidence forfeits appellate review of the claim because such failure deprives the trial court of the opportunity to correct potential error in the first instance." (*Id.* at p. 143.) Mendoza has forfeited this claim on appeal.

In any event, the *People v. Aranda*, *supra*, 63 Cal.2d 518 and *Bruton v. United States*, *supra*, 391 U.S. 123 rule does not apply to Chacon's preliminary hearing testimony. Only "testimonial" hearsay, "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," is subject to the confrontation clause. (*Crawford v. Washington* (2004) 541 U.S. 36, 52.) Hearsay is testimonial only if, "in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out of court substitute for trial testimony.'" (*Ohio v. Clark* (2015) 135 S.Ct. 2173, 2180.) Put another way, testimonial statements are statements "made with some formality, which, viewed objectively, are for the primary purpose of establishing or proving facts for possible use in a criminal trial." (*People v. Cage* (2007) 40 Cal.4th 965, 984, fn. 14.) "[A]t a

minimum, testimonial statements include ‘prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and . . . police interrogations.’ [Citation.] . . . [T]he confrontation clause addressed the specific concern of ‘[a]n accuser who makes a formal statement to government officers’ because that person ‘bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.’” (*People v. Gutierrez* (2009) 45 Cal.4th 789, 812–813.) Objectively viewed, Celaya’s informal conversation with his aunt Chacon did not have the primary purpose of creating a substitute for testimony at trial.

Mendoza’s failure to object forfeited this issue, and so we need not address whether Celaya’s statements were admissible under an exception to the hearsay rule. We note that even if admitting the evidence was error, any error was harmless.² Cynthia and Carmen testified that when they left the tattoo shop on the night of January 12, Mendoza was there with Lupe F., Celaya, and Henry. The next day, Mendoza called Cynthia and Carmen to come to the Cobalt house, where he showed them the trash can and told them that Lupe F. was inside. Mendoza described beating Lupe F. to death while she begged for mercy, because she had planned to kill him and had stolen the baseball cards. Mendoza told the women he planned to put Lupe F.’s body into a hole and burn it, and he needed someone to clean up the bloody tattoo parlor. DNA matching Mendoza’s and Lupe F.’s profiles was detected on shorts Mendoza wore when he was arrested. Henry testified that Mendoza and Celaya were at the tattoo shop with Lupe F. on January 12. When Henry picked Mendoza and Celaya up at the tattoo parlor on the morning of January 13, Mendoza said Lupe F. was not coming unless she had nine lives, Celaya said, “we” hit Lupe F. wrong, and Mendoza said Lupe F. had been kicking a little and broke some glass. Even without Chacon’s testimony, the evidence against Mendoza was overwhelming, and it is not reasonably probable he would have obtained a better result if

² Given our conclusion that any error in admitting Chacon’s testimony was harmless, we need not address Mendoza’s arguments regarding declarations against penal interest, adoptive admissions, coconspirator statements, severance, or ineffective assistance of counsel.

the testimony had been excluded. (See *People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1373.)

The admission of domestic violence propensity evidence

Mendoza argues that the trial court abused its discretion in admitting the recording of his May 16, 2013 jail telephone call to Anna M. pursuant to Evidence Code section 1109.³ Before trial, the prosecutor moved in limine to present testimony regarding Mendoza's prior violence against Lupe F.; two much older acts of violence against other women; and the recording of Mendoza's jail call to Anna M. Mendoza's counsel agreed that the evidence that Mendoza broke Lupe F.'s nose shortly before the murder was "fair game, an 1109 issue," but objected to admission of the jail call, which Mendoza made long after Lupe F. was murdered in January 2010. Given the "really overwhelming amount of evidence" against Mendoza, counsel argued that the call was much more prejudicial than probative. The prosecutor responded that the jail call showed that Mendoza had no remorse, was "a misogynist in the true sense of the word," and his violence against women was a continuing pattern. The trial court excluded the two older events as too remote. The court stated that the 2013 jail call was relevant and not substantially more prejudicial than probative, and admitted the recording and the prior violence against Lupe F. under sections 1101, subdivision (b) and 1109. Mendoza's counsel renewed his objection to the admission of the jail call during trial, and the trial court again ruled the recording was admissible.

Section 1101, subdivision (a) makes inadmissible evidence of a person's character, including in the form of specific instances of conduct, if offered to prove that person's conduct on a specified occasion, "[e]xcept as provided in . . . [s]ection[] . . . 1109." Section 1109, subdivision (a)(1), states: "[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the

³ All further statutory references are to the Evidence Code unless otherwise indicated.

evidence is not inadmissible pursuant to Section 352.” Section 352 gives the trial court discretion to exclude evidence whose probative value is outweighed by a “substantial danger of undue prejudice.”

On appeal, Mendoza initially argues that section 1109 on its face violates due process and equal protection. Although the California Supreme Court has not specifically ruled on the constitutionality of section 1109, in *People v. Falsetta* (1999) 21 Cal.4th 903, our Supreme Court considered a due process challenge to section 1108, a parallel statute allowing admission of a defendant’s other sex crimes to show a propensity to commit such crimes, so that propensity evidence was no longer per se unduly prejudicial. (*Id.* at p. 911.) The Supreme Court concluded that section 1108 did not violate due process because section 352 allowed the trial court, in its discretion, to exclude such evidence if its probative value was outweighed by the probability that the evidence would create undue prejudice, confuse the issues, or mislead the jury. (*Id.* at p. 917.) We agree with the many appellate courts which “have uniformly followed the reasoning of *Falsetta* in holding 1109 does not offend due process.” (*People v. Johnson* (2010) 185 Cal.App.4th 520, 529.) We agree that section 1109 does not violate Mendoza’s due process rights, given that section 352 provides “a realistic safeguard that ensures that the presumption of innocence and other characteristics of due process are not weakened by an unfair use of evidence of past acts.” (*People v. Harris* (1998) 60 Cal.App.4th 727, 730; *People v. Brown* (2000) 77 Cal.App.4th 1324, 1334.)

As for Mendoza’s equal protection argument, as section 1109 does not violate due process, it satisfies the requirements of equal protection “if it simply bears a rational relationship to a legitimate state purpose.” (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1312.) He argues that section 1109 singles out criminal defendants accused of domestic violence for special treatment without a rational basis. But “[t]he special relationship between victim and perpetrator in . . . domestic violence . . . cases, with their unusually private and intimate context, easily distinguishes these offenses from the broad variety of criminal conduct in general,” and “[t]he Legislature could rationally distinguish between these . . . kinds of cases and all other criminal offenses in permitting the

admissibility of previous like offenses in order to assist in more realistically adjudging the unavoidable credibility contest between accuser and accused. The fact that other crimes such as murder and mayhem may be more serious and that credibility contests are not confined to domestic violence cases does not demonstrate the absence of the required rational basis for the Legislature's distinction between these crimes.” (*Id.* at p. 1313; see *People v. Price* (2004) 120 Cal.App.4th 224, 240.) We agree with the reasoning of the court in *Jennings* and *Price*, and we reject Mendoza's facial equal protection challenge.

We turn to Mendoza's argument that the trial court abused its discretion in admitting the jail call to Anna M. Mendoza cites *People v. Johnson, supra*, 185 Cal.App.4th 520, in which the court concluded that other acts of domestic violence admitted into evidence were not substantially more prejudicial than probative under section 352, in part because (1) the acts had resulted in convictions, (2) the acts were similar to the charged crimes, (3) the acts were not too remote, given that similarity, and (4) the evidence of the current crime was strong, lessening the possibility that the jury would be swayed by the evidence of past acts. (*Id.* at pp. 531–533, 535–536.) The *Johnson* court found these factors relevant, but they are not prerequisites for admissibility under section 352. Nevertheless, even taking them into account, the factors support a conclusion that it was not an abuse of discretion to admit the jail call. First, just as the convictions in *Johnson* reduced the likelihood that the defendant could have rebutted the testimony regarding the past events (*id.* at p. 533), Mendoza does not contend he could have rebutted the identification of his own voice on the recording of the jail call. Second, the threats in the jail call were disturbingly similar to those surrounding the charged murder: Mendoza threatened from prison to kill his then girlfriend (later wife) Anna M., or have her killed, over money he accused her of taking. The evidence at trial was that he killed his girlfriend Lupe M. while accusing her of taking the valuable baseball cards. Third, although the jail call was over three years after the murder, during that time Mendoza had been in custody, presumably without domestic partners other than Martinez. Fourth, the evidence against Mendoza was extremely strong. We see no

probability that the recording of the jail call unduly prejudiced the jury. Thus, even if admission of the recording was error, the error was harmless. (*Id.* at p. 540.)

Celaya's appeal

Celaya argues there was insufficient evidence at trial that he aided and abetted Mendoza in murdering Lupe F., and at best the evidence showed he was an accessory after the fact. We disagree.

The evidence that Celaya aided and abetted in Lupe F.'s murder is sufficient if ““a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.”” (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) We examine the entire record and we view the evidence in the light most favorable to the prosecution, to determine whether the jury verdict is supported by evidence which is ““reasonable in nature, credible, and of solid value.”” (*Id.* at pp. 576–577.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] A reviewing court neither reweighs evidence nor reevaluates a witness’s credibility.”” (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) “Even if we might have made contrary factual findings or drawn different inferences, we are not permitted to reverse the judgment if the circumstances reasonably justify those found by the jury.” (*People v. Perez* (1992) 2 Cal.4th 1117, 1126.)

A defendant is an aider and abetter if, knowing the unlawful purpose of the perpetrator and intending to commit, encourage, or facilitate the offense, the defendant by act or advice aided, promoted, encouraged, or instigated the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) No agreement before the act is required, as aiding and abetting may be committed “as instantaneously as the criminal act itself.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531–532.) The trier of fact may consider the defendant’s presence at the scene, failure to take steps to prevent the crime, companionship, and conduct before and after the crime. (*People v. Garcia* (2008) 168 Cal.App.4th 261, 273.)

Cynthia testified that Henry, Celaya, Mendoza, and Lupe F. were together at the tattoo shop when she and Carmen left on the night of January 12, 2010. Carmen testified that when Celaya and Henry discovered the baseball cards were missing, Celaya said they needed to find out what was going on. A mixture of Celaya's and Lupe F.'s DNA was found on a triple-extra-large black T-shirt found at the tattoo shop, and Carmen testified Celaya was wearing a black T-shirt on January 12. When Celaya talked to Chacon on January 13, Celaya told her that Mendoza had killed Lupe F. because she had taken Mendoza's money and other belongings. Celaya told Chacon he had been at the tattoo shop during the murder. He and Mendoza had stuffed Lupe F.'s body in a trash bag and barrel and drove it in Celaya's truck to Sylmar. Celaya said his shoes were full of blood, and he had jumped into a swimming pool to erase DNA evidence from his shoes and clothes. He was looking for a crew to clean up the tattoo shop. Henry testified that after Cynthia and Carmen left the tattoo shop on January 12, Celaya told Henry to go buy him some duct tape and rope, and when Henry came back with the items, Celaya told him to fill up the tank of the truck and keep a lookout outside the tattoo shop. The next morning, when Henry picked Mendoza and Celaya up from the shop, Celaya asked Henry to get them some bleach and clothing, said "we" hit Lupe F. wrong, and also said he had hit her and choked her. Celaya's hand was swollen and his knuckles were reddened. This evidence placed Celaya at the tattoo shop before, during, and after the time of Lupe F.'s murder; showed that Celaya was aware the baseball cards were missing; established that Lupe F.'s DNA was mixed with Celaya's on a T-shirt that matched what Celaya was wearing on January 12; and included Celaya's own statements that he attempted to remove DNA evidence from his shoes and clothes, and that "we" hit Lupe F. "wrong." The jury could infer that Celaya participated in beating Lupe F. There was also evidence that Celaya participated in planning, ordering supplies such as duct tape and rope; put Henry on the lookout for police outside the tattoo shop; had reddened and swollen hands on January 13; and after the murder, helped put Lupe F.'s body into the garbage can and put the garbage can into his truck for transport to the Cobalt house. Further, Shamsi testified that he saw Celaya beating Lupe F. While Celaya claims that Shamsi was not a

credible witness, we do not reevaluate whether a witness is credible. Substantial evidence supports the jury's conclusion that Celaya aided and abetted Mendoza.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.